NO. 92-1536

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CIRCLE NATIVE COMMUNITY,

Petitioner,

v.

STATE OF ALASKA, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

On Petition For Writ of Certiorari To the Supreme Court Of The State of Alaska

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the courts of Alaska err in concluding that the Native Village of Circle lacked jurisdiction over F.P., W.M., and A.M.?

LIST OF PARTIES

The parties to the proceedings below are:

Petitioner: The Native Village of Circle

Respondent: The State of Alaska, Department of Health and Social Services

Mother: J.J.

Children: F.P., W.M. and A.M.

Guardian ad Litem: Office of Public Advocacy.

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NO. 92-1536

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CIRCLE NATIVE COMMUNITY

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v.

STATE OF ALASKA, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

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On Petition For Writ of Certiorari To the Supreme Court Of The State of Alaska

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The State of Alaska, Department of Health and Social Services, opposes issuance of a Writ of Certiorari to review the decision of the Supreme Court of the State of Alaska in this case.

OPINION BELOW

The Alaska Supreme Court decision is published as Matter of F.P., 843 P.2d 1214 (Alaska 1992).

STATEMENT OF THE CASE

The Alaska Department of Health and Social Services, Division of Family and Youth Services (DFYS) first became involved with F.P., W.M. and A.M. late on March 4, 1991.[1] Their mother, J.J.,

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[1] Petitioner provides a summary of the prior course of events in California (Petition at 3-5), but no evidence of those events was introduced in the Alaska case. Only the two California orders transferring jurisdiction to the Native Village of Circle were produced and filed as foreign judgments in the Alaska case under Alaska's version of the Uniform Enforcement of Foreign Judgments Act, AS 09.30.200-270. Petitioner has partially reproduced one of those orders as its Appendix D.

was found by state police in her apartment, unconscious and intoxicated, bleeding from her foot. The children, 5 years, 2 years and 18 months old, were hungry and without appropriate supervision. When DFYS was called, it took emergency custody of the children.

Under Alaska law, a hearing must be held within 48 hours of notification to the court that emergency custody has been taken. AS 47.10.142. At that first hearing on March 6, 1991, an attorney appeared on behalf of the Native Village of Circle (Circle) claiming that it was the "Indian child's tribe" for F.P., W.M. and A.M. and had jurisdiction over the children pursuant to the Indian Child Welfare Act (ICWA). Circle filed its Motion to Intervene on

March 12, 1991, which DFYS did not oppose because it knew the children had maternal relatives in Circle. Intervention was granted March 27, 1991.

Circle also filed a Motion to Dismiss DFYS' custody proceeding which was briefed by all parties, including supplemental briefing requested by the court. On June 28, 1991, the superior court denied the Motion to Dismiss. Circle filed a timely appeal to the Alaska Supreme Court which resulted in the decision Circle Native Community (Community) now asks this court to review, Matter of F.P., 843 P.2d 1214 (Alaska 1992). App. A of Petition.

After it filed its appeal in the Alaska courts, Circle filed a Complaint for Injunctive and Declaratory Relief in

federal district court in September 1991, attacking the state court decision. That complaint was dismissed on March 16, 1993, on the State's Motion for Summary Judgment, as a collateral attack on a state court decision.

The state court continues to exercise its jurisdiction over these children. It recently extended their placement in state custody while their mother works to control her addiction to alcohol so that they may safely be returned to her.

REASONS FOR DENYING THE WRIT

I. Summary

Even though the Ninth Circuit and the Alaska Supreme Court have inconsistent interpretations of the

effect of Public Law 280, 25 U.S.C. § 1360, on the respective jurisdiction of Alaskan courts and tribal courts in Alaska, this petition does not present a factual context within which to resolve the conflict. The petitioner, Community, has never been a party to any of the proceedings below and is still not a party. Thus, under this court's rules, it cannot petition for a Writ of Certiorari. In addition, the entity originally asserting tribal jurisdiction over the children, the Native Village of Circle, has been found not to be the "Indian child's tribe" of F.P., A.M., and W.M., thereby mooting any claim it had made to jurisdiction over them.

II. The Petitioner was not a party to the proceedings below.

Community has asserted it is the proper party in interest even though it did not exist until after the events it asks this Court to review. Its constitution, drafted pursuant to the Indian Reorganization Act (IRA), was adopted by the members August 20, 1991, and approved October 4, 1991, by the Secretary of the Interior. App. E of Petition. All the events material to the state appellate decision whose review is urged by Community occurred on or before June 28, 1991. No mention of Community was ever made to the superior court when it was considering Circle's jurisdictional claim. As a result, neither the superior court nor the Alaska Supreme Court ruled on whether

Community could even be a party to the child protection proceeding. Matter of F.P. addresses only Circle's jurisdictional claim. 843 P.2d at 1216.

From the time its constitution was approved by the Secretary of the Interior in October 1991 to the present, Community has taken no steps to intervene in the state court proceeding or to substitute itself for Circle. Since it was not and is not a party to the proceedings below, it is not a party "interested ... in [the] judgment" who may petition for a Writ of Certiorari under Supreme Court Rule 12.2 and 12.4.

III. The subject of this petition is moot.

The Petitioner argues that the Alaska Supreme Court's decision in Matter of F.P., 843 P.2d 1214 (Alaska 1992), should be accepted on a Writ of Certiorari because it is inconsistent with certain Ninth Circuit rulings. Petition at 6. Although this conflict between the courts' decisions exists, this case does not present a valid tribal claim of jurisdiction.

Circle moved to dismiss the state court proceedings on the grounds that it had prior exclusive jurisdiction over the children under 25 U.S.C. § 1911(a). Petition, App. C at 1. A tribal court may assert exclusive jurisdiction under Section 1911(a) if the Indian children reside or are domiciled within the

tribe's jurisdiction or if the children are the wards of the tribal court. In this case Circle claimed the children were wards of its tribal court because a California court had granted Circle's request to transfer the children's case from the California court to Circle. Developments subsequent to the filing of Circle's appeal in the Alaska Supreme Court have established that the California orders transferring jurisdiction to Circle were based on Circle's misrepresentations regarding the children's eligibility to be members of Circle. Those orders have therefore been vacated, as has the Alaska superior court's order recognizing Circle as the children's tribe.

A. These children never were members or eligible to be members of the Native Village of Circle .

Following the Alaska Supreme Court's remand of the child protection case to the superior court, the trial court has vacated its earlier order granting Circle's intervention. App. 1. It did so after the state proved that Circle had misrepresented the children's status given the membership criteria in the constitution the Native Village of Circle adopted in 1970.[2] App. 2.

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[2] The 1970 constitution was the only constitution in effect both in 1990 when California had custody and in March 1991 when Alaska took custody. It may still be in effect since Community's 1991 IRA Constitution is for an entity with a different name, has different members, and contains no statements that it replaces the earlier constitution. The only link is a reference to the Native Village of Circle in the Certificate of

(continued...)

To be members of Circle, one had to be on an original roll or to be a later resident of the village. Since none of these children were born in 1970 they could not have been among the original members of Circle. Instead they would have had to qualify under Article III, Section 2:

> a. New members. All children of any member, who are residents of Circle shall be members of this Community.
>
> b. Any person who becomes a resident of Circle may be adopted by the Council by a majority vote in its regularly called meeting.

App. 2 (emphasis added).

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[2](...continued)
Results of Election (Petition, App. E at 15) and the Department of the Interior's cover letter. It is not uncommon to have IRA councils and traditional councils in the same village.

As Petitioner has explained, the children and their mother were residents of California in 1985 when California authorities first became involved with them. Petition at 3. In fact, the mother, like F.P., W.M. and A.M., had been born, reared, and spent all her life in California until Circle brought the family to Alaska. Petition at 4-5. Therefore neither the mother nor the children met the residency requirement for becoming members of Circle in 1990 when Circle induced the California court to transfer jurisdiction to it. Even when Circle brought the mother and children to Alaska, none of them resided in Circle; they all settled in Fairbanks. Petition at 5. They were therefore still not eligible to become

members by 1991 when DFYS took custody of the children, nor when Circle moved to intervene, nor when it moved to dismiss.

Since Circle had and has no legitimate claim of authority over these children, the superior court would have to deny Circle's Motion to Dismiss if this case were remanded for reconsideration of the issue. This Court's review of the original state courts' grounds for denial of Circle's Motion to Dismiss therefore would not affect the practical outcome of this case. Circle's inability to claim the children as members moots the issue of whether P.L. 280 gave states exclusive or concurrent jurisdiction over the custody of Indian children.

B. The California orders purporting to transfer jurisdiction to Circle have been vacated.

The California court transferred jurisdiction to Circle[3] in 1990 under 25 U.S.C. § 1911(b). See App. D at D-4.[4]

25 U.S.C. § 1911 only authorizes an "Indian child's tribe" to petition for transfer, not any other tribe that may have heard of the children. Since neither the mother nor the children were even eligible to be its members in 1990 or 1991, Circle did not fit within the

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[3] Petitioner asserts California transferred jurisdiction to Community in March 1990. Petition at 5. Community, however, did not come into existence until October 1991 when its constitution was approved. Petition, App. E.

[4] In reprinting this handwritten order for Appendix D, a typographical error was made in the federal citation which read "USC 1911, Subsection b" in the original.

definition of "Indian child's tribe" in the Indian Child Welfare Act. 25 U.S.C. § 1903(5)(a). Circle was never "[t]he Indian tribe in which [F.P., W.M. and A.M. were] member[s] or eligible to be ... member[s]." Id. It therefore had no standing in 1990 to petition the California court to transfer jurisdiction to Circle under 25 U.S.C. § 1911(b). Petition, App. C at 2. The California orders, having been induced by Circle's serious misrepresentation of the children's status and its own, were defective. They have been vacated by the superior court in Alaska for that reason, again, after remand from the state Supreme Court. App. 3.

Although Community appears to have abandoned any arguments regarding

Alaska's failure to give full faith and credit to California's order, Circle could only claim exclusive jurisdiction over F.P., W.M. and A.M., who were non-residents, based on California's transfer of jurisdiction under 25 U.S.C. § 1911(b) to the children's alleged tribe. Those orders having been vacated, Circle has no basis for a claim of exclusive jurisdiction over these children who remain non-residents and non-members of Circle.

IV. Misstatements of Fact and Law

A. The Circle Native Community has not proved in state court that these children are members.

Petitioner asserts that F.P., W.M. and A.M. are members of Community. Petition at 2. It has to date made no such claim to the Alaska Superior Court

in the on-going child protection case. It has not moved to intervene in that case since the court vacated its prior order granting Circle's intervention. App. 1. Neither the children nor their mother is listed in "the roll of Circle Native Community approved by the Secretary of the Interior" in March 1990, when the family was just being moved to Alaska. While the children or their mother may meet its qualifications for membership (App. E, Article III, Section 2, at E 3-4), Community has not produced any documents demonstrating that any of them do qualify or have been recognized as members by Community.

In the absence of any proof that the mother or children have applied for and have been accepted as members of

Community, the record in this case makes it unsafe to assume their membership. If the children and their mother are not members, even the children's eligibility for membership, were it proved, would not make them "Indian children" under ICWA. Lacking his or her own membership, a child must be both eligible and "the biological child of a member of an Indian tribe" to come within the terms of ICWA. 25 U.S.C. § 1903(4). If their mother[5] is not a member, the children's mere eligibility does not make them "Indian children" for ICWA's purposes.

B. Circle Native Community is not an Indian tribe recognized under the terms of ICWA.

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[5] The children's fathers are non-Natives.

The ICWA definition of "Indian tribe" is broad, but the portion of the definition that refers to Alaska (25 U.S.C. § 1903(8))is tied to the Alaska Native Claims Settlement Act. It provides that "Indian tribe" includes "any Alaska Native village as defined in section 1602(c) of Title 43...." Id. This provision in turn cross-references lists of villages eligible to participate in the claims settlement. 43 U.S.C. § 1602(c). Circle is on the list in 43 U.S.C. § 1610(b)(1) and is a tribe for purposes of ICWA.

The question remains of what entity is the legitimate governing authority of that village, Circle or Community. Community's 1991 constitution makes no reference to the Native Village of

Circle,[6] except for residence there as one possible basis for membership. The new constitution's effect on Circle's 1970 constitution, which was expressly for the Native Village of Circle, remains unclear as a result.

The Alaska amendment to the Indian Reorganization Act allows

> ...groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-

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[6] Community's reliance on Noatak v. Hoffman, 896 F.2d 1157 (9th Cir. 1990), reviewed on other grounds, sub nom. Blatchford v. Native Village of Noatak. ___ U.S. ___,111 S.Ct. 2578 (1991), is misplaced. Community was not involved in that case either. Rather the court was dealing with Circle's traditional council. Moreover Noatak found Circle to be a tribe only for the jurisdictional purpose of 28 U.S.C. § 1362. 896 F.2d at 1160; Native Village of Venetie IRA Council v. Alaska, 944 F.2d 548, 552 (9th Cir. 1991).

> defined neighborhood, community, or rural district, [to] organize to adopt constitutions and bylaws....

25 U.S.C. § 473(a). Mere approval of an IRA constitution for an Alaska Native village does not constitute recognition that the group adopting the constitution qualifies as a tribe with sovereign powers. State of Alaska v. Native Village of Venetie, 856 F.2d 1384, 1387 (9th Cir. 1988); see also Native Village of Venetie IRA Council v. Alaska, 944 F.2d 548, 4559 (9th Cir. 1991). In fact, when Community's constitution was approved, the Department of the Interior was careful not to use the word "tribe"

(Petition, App. E at 1) and to limit the significance of its approval.[7]

Community, given the ambiguity created by the new constitution, cannot avoid the need to establish before a court of competent jurisdiction that it is "the modern-day successor to [a] sovereign historical band[] of natives...." Venetie IRA, 944 F.2d at 559. No proof on this issue has been presented in the state court proceedings. In this context, Community's failure to claim to be the tribe of these children by moving to intervene in the on-going custody

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[7] Community failed to provide the Certificate of Approval in its reprint of the constitution for its Appendix E. That Certificate is reprinted as the State's Appendix 4.

proceeding at any time since its constitution was approved in October 1991 must be taken as a recognition that it has no standing to intervene in that proceeding.

Petitioner asserts that the Venetie IRA holding regarding the need to prove tribal status relates only "to the unique tribal structure of the Venetie IRA...." Petitioner at 8, n.4. This assertion ignores the express language of the Ninth Circuit, applying the proof requirement to both Venetie and Fort Yukon. 944 F.2d at 558-59. Moreover, the parties in Venetie IRA did not present any evidence of a unique tribal structure in Venetie. Id. at 550. That issue was raised only in the earlier

Venetie tax case, State of Alaska v. Native Village of Venetie, where the existence of multiple councils was significant because one of them had passed a tax ordinance. 856 F.2d at 1386. The Venetie example demonstrates that approval of Community's IRA constitution has complicated the question of what entity is the tribe at Circle, rather than simplifying it.

C. The Alaska Supreme Court's position does not create a conflict with other states.

Petitioner has argued that the Alaska Supreme Court's holding that P.L. 280 gave Alaska's state courts exclusive jurisdiction over child protection proceedings along with other civil causes of action creates a conflict with states like California. Community has

not identified a California Supreme Court decision that conflicts with the Alaska decisions. Rather its theory seems to be that a California court faced with a motion to transfer jurisdiction to an Alaskan village would inevitably rule differently than an Alaska court faced with the same motion, because P.L. 280 did not "subject Alaskan tribes to California jurisdiction." Petition at 10. However, Petitioner fails to understand that in cases like this one, the state's jurisdiction rests on the mother's and children's residence in that state, not on P.L. 280. Even if P.L. 280 created concurrent jurisdiction between the mandatory states and affected tribes, if the family lives outside the

reservation, the state would have jurisdiction. The P.L. 280 effect of giving Alaska exclusive jurisdiction over Alaska Natives in Alaska is therefore irrelevant to whether California has jurisdiction over its Indian residents who are not members of a California tribe.

The effect of P.L. 280 in Alaska becomes relevant to California only when an entity in Alaska requests a transfer of a custody proceeding under 25 U.S.C. § 1911(b). If the requesting Alaska tribe has not reassumed jurisdiction over such proceedings through the process that 25 U.S.C. § 1918 made available expressly for tribes in P.L. 280 states, no other state's courts can validly transfer a case to that Alaska

tribe. Other state's courts cannot be assumed to be familiar with the law on these matters as it affects tribes in Alaska. As a result, any attorney representing an Alaska tribe has an ethical duty to bring the relevant cases to the court's attention.

DR 7-106(B)(1). The meager documents available in this case from the California courts do not reveal any discussion of this legal issue. The conflict Circle hypothesizes is, therefore, really a strawman of Circle's own making.

CONCLUSION

Since Community is not a proper petitioner and Circle did not have grounds for asserting jurisdiction over

the children in this case, this Court should deny the requested Writ of Certiorari.

DATED at Fairbanks, Alaska, this 19th day of April, 1993.

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APPENDIX 1

IN THE SUPERIOR COURT FOR

THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

IN THE MATTER OF:	)
	)
[M], [A]	)
DOB: 11/6/89	)
	)
[M], [W]	)
DOB: 6/16/88	)
	)
[P], [F]	)
DOB: 4/25/85	)
	)
Minors Under the	)
Age of Eighteen (18)	)
Years.	)
	)

Case No. 4FA-91-37 CP

ORDER VACATING ORDER FOR INTERVENTION

This matter having come before the court on the Department's Motion to Vacate Order for Intervention, and the court having considered the parties' responses,

IT IS NOW ORDERED that the court's Order for Intervention entered March 28,

1991, is VACATED without prejudice to submission of a new motion by the appropriate entity which can establish that it is the Indian tribe of these children under 25 U.S.C. 1903(5).

DATED: February 19, 1993

/s/
Mary E. Greene
SUPERIOR COURT JUDGE

APPENDIX 2

CONSTITUTION AND BYLAWS

of the

Village of CIRCLE

Alaska

PREAMBLE

We, a group of residents of Circle, Alaska having a common bond of residence, in order to promote our welfare through the development of governmental and economic enterprises, do establish this Constitution and Bylaws.

ARTICLE I - NAME

The name of this organization shall be Native Village of Circle.

ARTICLE II - DEFINITION OF TERRITORY

The jurisdiction of this Council shall be in and around Circle Village. (Define here the exterior boundaries of your village where the jurisdiction of this Constitution and Bylaws will cover.)

ARTICLE III - MEMBERSHIP

Section I - All persons whose names shall appear on the census roll being all members of this village residing in Circle shall be the members of this Community.

Section 2 - a. New members. All children of any member, who are residents of Circle shall be members of this Community.

BYLAWS OF CIRCLE VILLAGE

...

ARTICLE VI - ADOPTION

This Constitution and Bylaws shall be in effect when _____ is agreed to by a majority vote of the village members ____ing in an election called for the purpose; Provided _____ at least 30 per cent of the voting membership take _____. The persons entitled to vote are all the adult residents in the village of Circle Alaska.

CERTIFICATION OF ADOPTION

We, the undersigned members of the village having _____ a chosen to be the election judges by the majority of _____ members, certify that we were present at an election called for the

purpose of adopting this Constitution and Bylaws on October 9, 1970; that the foregoing was duly adopted at such election by a vote of 11 for, and 0 against, where at least 30 per cent of those entitled to vote cast their ballots.

Albert Carroll Sr./s/
Chairman, President

Irving John Sr./s/
Chairman, Vice-Pres

APPENDIX 3

IN THE SUPERIOR COURT FOR

THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

IN THE MATTER OF:	)
	)
[M], [A]	)
DOB: 11/6/89	)
	)
[M], [W]	)
DOB: 6/16/88	)
	)
[P], [F]	)
DOB: 4/25/85	)
	)
Minors Under the	)
Age of Eighteen (18)	)
Years.	)
	)

Case No. 4FA-91-37 CP

ORDER VACATING CALIFORNIA ORDERS

This matter having come before the court on the Department's Motion to Vacate California Orders, and the court having considered the parties' responses,

IT IS NOW ORDERED, under Civil Rule 60(b), that the orders of the Superior

Court of the State of California, County of Santa Clara Juvenile Court, purporting to transfer jurisdiction of its child protection proceedings involving Florinda Pizarro and Anthony and William Martinez to the Native Village of Circle pursuant to 25 U.S.C. § 1911(b) are VACATED.

DATED: 2/19/93

/s/
Mary E. Greene
SUPERIOR COURT JUDGE

APPENDIX 4

I, Eddie F. Brown, Assistant Secretary - Indian Affairs, by virtue of the authority granted to the Secretary of the Interior by the Act of June 18, 1934 (48 Stat. 984), as amended, and delegated to me by 230 D.M. 2.4, do hereby approve the Constitution of the Circle Native Community, Alaska. This approval shall not be construed to validate any assertion that the Circle Native Community has governmental authority over lands (including management of, or regulation of the taking of fish and wildlife) or persons who are not members of the Community, absent a ruling by a court of competent jurisdiction, an opinion of the Solicitor of the Department of the Interior or an Act of Congress

subsequent to the date of this certification which indicates the existence of such authority over lands or non-members. This Constitution is effective as of this date; Provided, That nothing in this approval shall be construed as authorizing any action under this document that would be contrary to Federal Law.

Eddie F. Brown /s/
Assistant Secretary -
Indian Affairs

Washington, D. C.

Date: October 4, 1991